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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,*	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al.,	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE**

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

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INTRODUCTION

Plaintiffs' First Amended Complaint challenges the sufficiency of the administrative redress process currently available to individuals who believe they are on the No Fly List implemented by Transportation Security Administration's ("TSA"); Plaintiffs demand, *inter alia*, that such individuals receive notice that they have been placed on the No Fly List and the grounds for such placement, as well as an opportunity to rebut any derogatory information underlying their placement. *See* First Amended Complaint for Injunctive and Declaratory Relief ("Am. Compl."), Docket # 15, ¶ 5 ("Plaintiffs seek a hearing in which they can confront any evidence against them"); *id.* at Prayer for Relief (seeking an injunction that includes additional notice of the "charges" and an opportunity to rebut the evidence). Ultimately, Plaintiffs challenge what they perceive as the confidential aspects surrounding the No Fly List and the administrative redress process of which they have availed themselves, known as the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP"). In their dispositive motion, Defendants publicly describe – to the extent possible without compromising the very information that the process was designed to protect – the current procedures for placing an individual on the No Fly List and the DHS TRIP redress procedures available to those who believe they were denied boarding an aircraft due to inclusion on the No Fly List. Defendants also describe the government interests in protecting vital intelligence, counterterrorism, and law enforcement information and aviation security. To more fully describe the relevant procedures, and to give a further explanation of why Plaintiffs' requested relief could cause significant damage to the national security, Defendants have offered the Court limited *ex parte* and *in camera* submissions, thus enabling the Court to further understand the challenged process.

Plaintiffs have filed a Motion to Strike, arguing that the Court lacks any discretion to consider these submissions and that if the Court does consider them, Plaintiffs' counsel must be cleared to have access to the submissions as well. As part of its judicial review function, this Court has inherent authority to review *ex parte* information, and courts have rejected the argument that review of such evidence is *per se* violative of due process. Courts have reviewed *ex parte* information when reviewing administrative records that include classified and privileged information, when deciding whether disclosure of the *ex parte* information is warranted, and in certain other situations in which full disclosure of the relevant information could damage national security. In the present situation, the Court has discretion to review information directly relevant to the claims, as framed and pled by Plaintiffs.

Defendants have submitted *ex parte* three different types of information: classified information, law enforcement privileged information, and sensitive security information ("SSI"). Each is submitted for a different purpose, and the disclosure of each type of information poses different security risks and is subject to different statutory, regulatory and judicial protections and processes. The classified information is submitted solely for the purpose of describing the risks to national security presented by Plaintiffs' demand that the government be ordered to publicly present evidence supporting a nomination to the No Fly List so that such information can be rebutted and confronted. The Court has discretion to consider such information, but it lacks authority to order disclosure of the classified material or the granting of security clearances so others may access it. The law enforcement privileged information submitted to the Court provides a general background on the administration of the No Fly List, including information about how individuals are added to the list and the procedures followed when U.S. persons are denied boarding on flights to the United States. The Court has discretion to review the very agency procedures that are implicated by Plaintiffs' claims without compromising the information the process was designed to protect. Finally, Defendants submitted a small amount of SSI *ex parte,* including the criteria for placement on the No Fly and Selectee Lists, the relevant guidance for these criteria, and information about the procedures followed when U.S. persons are denied boarding on flights to the U.S. SSI is protected from disclosure even to counsel under a protective order except in certain limited circumstances established by statute, and Plaintiffs have not yet made a showing that they are entitled to disclosure under this limited statutory exception.

Defendants do not claim that the Court must review the *ex parte* submissions to rule in Defendants' favor. Indeed, the first issue the Court must decide is whether it has the jurisdiction over this case at all. Defendants do not rely on the *ex parte* information in the pending Rule 19 motion to dismiss. Further, the Court can and should resolve the motion to dismiss and for summary judgment in Defendants' favor without access to this material based on the Defendants' public descriptions of the administrative process. In any event, the Court should not declare an administrative process to be unconstitutional (as Plaintiffs' Complaint demands) where additional information concerning the safeguards provided as part of that process cannot be disclosed and could only be considered *ex parte*.

ARGUMENT

As set forth below, there is no authority for Plaintiffs overarching argument that "principles embedded in our adversarial system of justice prohibit a court from granting summary judgment on the basis of *ex parte* submissions." Pls' Mem. In Support. Mot. to Strike, Docket No. 52 ("Pls. Br.") at 4. Although *ex parte* review of information is the exception to the norm, under appropriate circumstances, courts can and have considered *ex parte* submissions when deciding motions for summary judgment and handling other aspects of litigation. Thus, Plaintiffs contention that the government's *ex parte* filings are improper is meritless.

I. *EX PARTE* REVIEW OF INFORMATION BY THE COURT IS NOT A *PER SE* VIOLATION OF DUE PROCESS

The Ninth Circuit has explicitly recognized that it is appropriate for a court to review *ex parte* information, depending on the circumstances. These circumstances have included a review of dispositive motions, including summary judgment, standing, and demands for disclosure of information. For example, in *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991), the Circuit court noted that *ex parte, in camera* review of the government's dispositive filing can "adequately balance[ ]" government and private interests because the private party's "interests as a litigant are satisfied by the decision of an impartial district judge." Subsequently, in a similar context to this case, in *Gilmore v. Gonzales*, 435 F.3d 1125, 1131 (9th Cir 2006), the court reviewed *ex parte* information to make a standing determination where the plaintiff claimed to have a constitutional right to travel by plane without identification. The Court has explicitly approved *ex parte, in camera* review of documents requested under FOIA. *See Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983) ("*In camera* proceedings, particularly in FOIA cases involving classified documents, are usually non-adversarial, with the party who is seeking the documents denied even this limited access to the documents he seeks to obtain."). The D.C. Circuit in *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), held that courts have "inherent authority to review classified material *ex parte in camera* as part of their judicial review function," and a judge in this district rejected a claim similar to Plaintiffs' and reviewed *ex parte* and *in camera* the classified and law enforcement sensitive portions of the administrative record supporting the designation of Al-Haramain Islamic Foundation as a terrorist supporter. *Al-Haramain Islamic Found. v. Dep't of Treas.*, 585 F. Supp. 2d 1233, 1259-60 (D. Ore. 2008) (King, J.) (appeal pending).

Ex parte submissions are also appropriate where the issue to be decided is whether or not information must be disclosed. *See United States v. Reynolds*, 345 U.S. 1, 8-9 (1953) ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."); *Pollard*, 705 F.2d at 1153 (authorizing review of requested FOIA documents); *see also Doe v. CIA*, 576 F.3d 95, 105 (2d Cir. 2009) ("The proceedings at issue here were held *ex parte* and *in camera* for good and sufficient reason, however; to ensure that legitimate state secrets were not lost in the process."); *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) (both parties filed appellate briefs *in camera* and *ex parte* to address claims of privilege); *cf.* Fed. R. Evid. 104(a) (courts are not bound by the rules of evidence in proceedings to determine the admissibility of evidence).[1] In this case, Plaintiffs' challenge to the sufficiency of the existing redress process necessarily raises a question about whether information must be disclosed.

Not a single case cited by Plaintiffs dictates a rigid rule against *ex parte* use of sensitive information in all cases. "[I]t is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Restaurant*

[1] Plaintiffs attempt to distinguish the many FOIA and state secrets cases as situations where the disclosure of the *ex parte* information itself was at issue. This effort fails on its own terms because the present case also directly presents such an issue; in their Complaint, Plaintiffs claim that they have a due process right to a transparent and adversarial administrative proceeding regarding the government's alleged decision to place them on the No Fly List, whereas Defendants contend that the administrative process afforded to Plaintiffs is proper. Plaintiffs' argument also fails more broadly for two reasons. The state secrets cases are not only about disclosure of the information; the Ninth Circuit has held that district courts may dismiss cases based on *ex parte* information showing a proper assertion of the privilege. *See Jeppesen*, 614 F.3d 1070. Moreover, courts, including the Ninth Circuit, have relied on *ex parte* information outside the context of disclosure of information. *See, e.g., Meridian Int'l Logistics*, 939 F.2d at 745 (*ex parte* submission on merits); *Gilmore*, 435 F.3d at 1131 (*ex parte* submission on jurisdictional issues); *United States v. Thompson* , 827 F.2d 1254, 1258 (9th Cir. 1987) (collecting criminal cases in which *ex parte* proceedings were allowed); *Al-Haramain*, 585 F. Supp. 2d at 1182 (merits of IEEPA designation); *see also Jifry*, 370 F.3d at 1182.

Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In considering a party's objection to an *ex parte* filing, courts must consider not only the private interests that will be affected by the *ex parte* filing and the risk of an erroneous deprivation of those interests, but also the particular "Government[al] interest, including the function involved" and the additional value or burdens that additional or substitute procedural requirements would entail. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Buckingham v. USDA*, 603 F.3d 1073, 1082-83 (9th Cir. 2010).

Plaintiffs' overall assertion that *ex parte* submissions are improper obscures the purpose of the particular submissions in this case. At this time, Defendants have not submitted the administrative records for the DHS TRIP complaints of the individual plaintiffs; nor have Defendants submitted any information related to any individual Plaintiff (or any individual), or otherwise asked the Court to rule *ex parte* on the merits of any alleged placement on the No Fly List. Accordingly, the alleged "liberty" or "property" interest presently at issue is not the alleged "right" to fly or to return to the country; rather, Plaintiffs' current motion contends that it would violate their due process rights if the Court relied on *ex parte* information in ruling on Defendants' dispositive motion.[2] That is not the case.

Even under the *Mathews* test advocated by the Plaintiffs, courts take a nuanced approach about any procedures the Constitution may require given the interests at stake. *See Buckingham*, 603 F.3d at 1082-83. In order to fully explain certain aspects of the administrative process and

[2] The Plaintiffs' Motion to Strike does not require the Court to resolve the underlying question of the adequacy of DHS TRIP or the propriety of *ex parte* judicial review of the DHS TRIP administrative records. Although the Court need not reach the question at this time, such a presentation of *ex parte* information in the context of record review likely would be permissible. *See, e.g., Al-Haramain Islamic Found.*, 585 F. Supp. 2d at 1259; *see also Jifry*, 370 F.3d at 1182; *Holy Land Found.*, 333 F.3d at 164; *Global Relief Found.*, 315 F.3d at 754.

why other aspects must remain *ex parte*, Defendants submitted three different kinds of information — classified, law enforcement sensitive and sensitive security information, and each type of information serves a different purpose for the court, disclosure of each kind poses different threats to national security, and each is subject to different legislative, judicial or executive protections and process. Because the interests of the Plaintiffs, the Court and the public differ with respect to different aspects of the *ex parte* submissions, if it applies the *Mathews* factors, the Court should take a more granular and nuanced approach than that advocated by Plaintiffs and evaluate each aspect of the *ex parte* submission distinctly. Nonetheless, Defendants will briefly overview the common issues here.

The Interests of the Government. The government's interests supporting the *ex parte* submissions differ with respect to the various types of information and are therefore discussed separately and in more detail below. As an overarching matter, however, "no governmental interest is more compelling than the security of the nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Wayte v. United States*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning."). Here, the disclosure of the *ex parte* information would cause harm to national security, compromise sensitive counterterrorism activities, or be detrimental to the security of civil aviation.

As the Seventh Circuit explained in allowing the government to rely on an *ex parte* administrative record in an IEEPA matter, "administration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered *ex parte* by the district court . . . . The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives." *See Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002). *See also Al-Haramain Islamic Found.*, 585 F. Supp. 2d at 1258-60 ("The government's interest in keeping materials secret takes precedence over [Plaintiff's] due process right to review the record against it.").[3]

In evaluating such claims, courts routinely defer to Executive assessments of national security risks. *See, e.g., CIA v. Sims*, 471 U.S. 159, 179 (1985) (deferring to the CIA's assessment of the risk of disclosure in a FOIA matter); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (deferring to executive assessment of risk in evaluating the applicability of the state secrets privilege); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (finding it impermissible for trial court to "perform[] its own calculus as to whether or not harm to the national security . . . would result from disclosure" of information affecting national security); *Ctr. for Nat'l Sec. Studies*, 331 F.3d 918, 926, 927-28 (D.C. Cir. 2003) (surveying the significant authority "counseling deference in national security matters"); *Al-Haramain Islamic Found.*, 585 F. Supp. 2d at 1249 (deferring to executive assessment of whether ostensible charity was supporting terrorism). The Supreme Court recently reiterated this principle in *Holder v. Humanitarian Law Project*, in which the Court upheld a criminal prohibition on material support to foreign terrorist organizations against constitutional challenge. 130 S. Ct. 2705. In so doing, the Court discussed at length the deference due to both the Legislative and Executive Branches in review of factual conclusions in this arena. The Court reasoned that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." It is vital in this context "not to substitute . . . our

[3] Defendants' Memorandum in Support of Summary Judgment describes the government's extraordinary interest at stake in the underlying DHS TRIP administrative determination. *See* Defs. Summ. J. Br., Docket #44 ("Defs. SJ") at 29 (describing contemporary dangers of air terrorism) & 40-47 (describing dangers of disclosures and balancing the interests involved.)

own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *See Humanitarian Law Project*, 130 S. Ct. at 2727-28 (internal citations omitted). Although the Court was clear that national security concerns "do not warrant abdication of the judicial role," the Court held that "when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Id*. (internal quotation marks omitted).

Finally, the interests of the government and the public in nondisclosure are particularly compelling here, where the underlying purpose for the creation of the Terrorist Screening Center ("TSC"), and the centralization of the No Fly and Selectee Lists, was to encourage, and require, greater intelligence-sharing among federal agencies. Before TSC was created, multiple terrorist watchlists were maintained separately in different agencies; since then, the TSC has consolidated and centralized the watchlists, as the 9/11 Commission recommended. *See* First Declaration of Christopher Piehota, Docket No. 44-1 ("First Piehota Dec."), ¶¶ 5-6, 9-11.[4] In 2003, the President ordered the establishment of a governmental organization that would "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." *See* Homeland Security Presidential Directive 6; *see also* Declaration of Mark Giuliano, Docket Nos. 44-2, 46-1 ("Giuliano Dec."), ¶ 5; First Piehota Dec., ¶ 6. The creation of TSC satisfied this Presidential Directive.[5] *See* Giuliano Dec.,

[4] *See* 9/11 Commission Report, Executive Summary, available at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The missed opportunities to thwart the 9/11 plot were also symptoms of a broader inability to adapt the way government manages problems to the new challenges of the twenty-first century. Action officers should have been able to draw on all available knowledge about al Qaeda in the government. Management should have ensured that information was shared and duties were clearly assigned across agencies, and across the foreign-domestic divide.")

[5] TSC is an interagency entity that was created through a Memorandum of Understanding entered into by the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence in order to fulfill the requirements of HSPD 6. *See* Piehota Dec., ¶ 2; Declaration of

¶ 5. Similarly, TSA has been directed by statute "to use information from government agencies" to identify travelers who may pose a threat to national security, and to "prevent [those] individual[s] from boarding an aircraft." 49 U.S.C. § 114(h)(3)(A), (B); *see also* First Piehota Dec., ¶¶ 2-4. It would be particularly inappropriate to jeopardize sensitive information when Congress and the President created TSC and TSA specifically to encourage sharing of sensitive information within the government. In a government program like the No Fly List, timely and accurate intelligence sharing of sensitive and classified information within the government is central to success; protecting the government's ability to shepherd this process, and protect the information from disclosures, is crucial.

The Interests of the Plaintiffs. The information at issue is background that the Court may find instructive, as opposed to information specific to each Plaintiff, and Plaintiffs are fully able to pursue their case based on the publicly available version. Moreover, the interests of the Plaintiffs in seeing each type of information submitted here could differ, depending upon how the Court may use it. For example, if the Court were to find a due process violation in the process afforded Plaintiffs through DHS TRIP (even though the agencies that administer that program are not even part of this lawsuit), the Court could nonetheless rely on information about current procedures in its remedy decision. And the Court should certainly take a serious look at the potential harm to national security if it were inclined to order the disclosures sought by Plaintiffs. Moreover, the alleged interests of the Plaintiffs in this material are substantially protected by the considerable public information contained in the Defendants' public filings. *See* Defs. Summ. J. at 32-47, *see generally* First Piehota Dec., Giuliano Dec.

James G. Kennedy, Docket No. 44-3, ¶ 9. TSC is administered by the Department of Justice (through the FBI); it is staffed by officials from a variety of agencies, including TSA, CBP, and the Department of State. Piehota Dec., ¶ 2.

Risk of Error and Value of Additional Process. Because the information at issue does not pertain to the specific situation of each Plaintiff, Plaintiffs cannot purport to have relevant personal knowledge that may contradict the *ex parte* submissions. Plaintiffs have no knowledge regarding the *ex parte* aspects of the administrative process and no special expertise relevant to assessing the national security risks posed by any information they seek. Indeed, as explained above, courts routinely defer to the judgment of the Executive Branch in this area. The value of additional access by Plaintiffs is therefore quite low. Indeed, as compared to simply removing the *ex parte* information, judicial review of the *ex parte* information should be expected to *reduce* the risk of error. In any event, Plaintiffs' ability to present their views based on the publicly available portions of the material provides the full benefit of the adversarial process.

For these reasons, Plaintiffs' broad assertion that the Court cannot review sensitive information *ex parte* and *in camera* in connection with a motion for summary judgment is clearly wrong, as we show further for each type of information at issue.

II. THE COURT MAY REVIEW CLASSIFIED INFORMATION AND CANNOT ORDER ITS DISCLOSURE.

Defendants have offered limited classified information to the Court solely for the purpose of providing a more detailed explanation of the security interests at stake in No Fly List nomination procedures and how the disclosures sought by Plaintiffs would cause harm to national security. As an initial matter, the propriety of the government's classified filing will be irrelevant if the Court concludes the Complaint must be dismissed because Plaintiffs have failed to sue a necessary party that cannot be joined to this action. In addition, Defendants do not contend that it is necessary for the Court to review classified information because they have articulated the same arguments in a way that may be discussed publicly. *See* Defs' SJ at 40-43 (describing likely harms from disclosure of information related to watchlisting); Giuliano Dec. ¶

4, 13-22 (finding that the disclosure of such information "reasonably could be expected to cause serious harm to national security"). The Government submitted a classified discussion to further inform the court as to the significant harms to national security that would result from the disclosure of information related to watchlisting. This *ex parte* submission is thus relevant to the weighty government interests involved in evaluating Plaintiffs' due process claim. But the public record on this point should be sufficient, and thus, the Court can and should rely first on public information.

A. The Court Has Discretion to Review Classified Information *Ex Parte*

In any event, as set forth above, Courts have "inherent authority" to review *ex parte* submissions as part of its judicial review function when disclosure would endanger national security, and courts have held that this inherent authority extends to classified information. *See Jifry*, 370 F.3d at 1182; *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007) (considering classified information in the context of summary judgment on Fourth Amendment claims); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Pollard*, 705 F.2d at 1153.[6]

Plaintiffs' heavy reliance on *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) ("*AADC*"), is misplaced. *AADC* involved a challenge based on "INS regulations [which explicitly] required that all issues of statutory eligibility for immigration benefits, including legalization, be determined solely on the basis of information in the record disclosed to the applicant." 70 F.3d at 1067. Clearly, the use of classified evidence (in the covered circumstances) would violate that *regulatory* requirement. The circuit court emphasized

[6] Plaintiffs may note that at times Congress has given explicit statutory authority for *ex parte* review of classified information. *See, e.g.*, 50 U.S.C. §§ 1702(c). That Congress has approved it in some instances, however, does not render such review invalid elsewhere. After all, if there were a constitutional bar to ex parte consideration of classified evidence, as Plaintiffs claim, the bar would also apply to Congress.

this point, holding "there is no statutory or regulatory basis supporting the Government's interest in use of classified information in legalization decisions pursuant to § 1255a." *Id*. at 1068. Although the Court did explicitly hold that the *ex parte* procedure at issue was also unconstitutional, it did so after finding that the government had not demonstrated a strong interest in protecting its information. *See id*. at 1070. It is thus distinguishable on at least two counts. First, in *AADC*, the government was acting directly contrary to a pre-existing Executive Branch determination that disclosure was warranted; here, there are no such requirements for disclosure.[7] Moreover, the *ex parte* submissions in this case are not in the immigration context and are not yet offered to defend the merits of a substantive agency decision about the Plaintiffs; instead, they illuminate the threshold question of whether the challenged administrative process is consistent with requirements of due process.

Additionally, Plaintiffs rely on extensive dictum in *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986). In that case, the plaintiffs challenged the denial of visa applications as violating statutory provisions and the First Amendment. The majority opinion vacated the district court decision on the merits, finding that further development was needed as to proper statutory interpretation and as to how the current administrative visa process was applied. The majority also noted its "grave concern" with the district court's extensive reliance on *ex parte*

[7] Plaintiffs cite a number of other old district court decisions from other Circuits directly related to immigration status and bail, issues with a considerable impact on personal liberty. *See, e.g.*, *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 408 (D.N.J. 1999) (expressly declining to overturn the regulations that arguably permitted *ex parte* evidence but finding the use of *ex parte* unconstitutional as applied in that case); *Rafeedie v. INS*, 795 F. Supp. 13 (D.D.C. 1992) (limited to a particular bail decision in the immigration context and says nothing about the courts' ability to review classified information in other contexts). It is at least noteworthy that the Third Circuit, in a later opinion on attorneys' fees, criticized the *Kiareldeen* district court's reasoning and conclusions. *See Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001) (not reviewing the district court's decision but criticizing several aspects of the decision and emphasizing the importance of protecting classified information and protecting the country from terrorist attack); *see also Jay v. Boyd*, 351 U.S. 345, 361 (1956) (authorizing use of *ex parte* information in deciding discretionary application for suspension of deportation).

submissions without apparent justification, and sketched three exceptions to the general rule against use of *ex parte* materials. *Id*. at 1060-61. The court did not claim, however, to exhaustively describe the instances in which *ex parte* material may be used, and it did not prohibit the district court from relying on *ex parte* material; instead, the majority directed the district court to be mindful of the "importance of assuring plaintiffs' receipt of the most complete information and explanation permissible." *Id*. at 1061. Finally, Plaintiffs' reliance on a rigidly defined set of exceptions to full adversarial hearings, such as those described in *AADC* and *Abourezck*, fails to take account of more recent caselaw allowing such affirmative use in appropriate circumstances, such as the D.C. Circuit's more recent opinion in *Jifry*, 370 F.3d at 1182.[8]

For the foregoing reasons, the Court may – but need not—consider the classified *ex parte* submission in granting the Government's motion.

B. The Court Lacks Authority to Order Disclosure of Classified Information

Should the Court determine that the Government's classified submission may not be considered *ex parte*, it should not in any event grant access to that information to Plaintiffs or

[8] Plaintiffs also attempt to distinguish the IEEPA and AEDPA cases involving designation of terrorist organizations based on *dicta* in a recent decision by the D.C. Circuit. In *People's Mojahedin Organization of Iran v. Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010), *in dicta*, the court stated that the court had never squarely decided whether an "administrative decision relying critically on undisclosed classified information" would comport with due process. Of course, in making its due process argument, the government here does not purport "to rely critically" on *ex parte* information, as explained above. The *PMOI* decision gives no explanation of the contours or meaning of that phrase and does not purport to overturn the established precedent in the D.C. Circuit holding that *in camera ex parte* judicial review of the classified record in challenges to blockings made pursuant to IEEPA and the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 18 U.S.C. § 2339B, does not violate due process. As Judge Henderson notes in her concurrence in *PMOI*, 613 F.3d at 231-32, the D.C. Circuit has upheld AEDPA designations based on review of both the classified and unclassified portions of the administrative record, *see Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004) ("Based on our review of the entire administrative record and the classified materials appended thereto"), and has rejected due process challenges to the use of classified information in other contexts, *see Jifry*, 370 F.3d at 1184; *Holy Land Found.*, 333 F.3d at 164.

their counsel, as they propose. As the Supreme Court has held, "[t]he President . . . is the 'Commander in Chief of the Army and Navy of the United States' . . . [h]is authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power . . . and exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). This executive control of national security information is dictated by constitutional separation of powers because exclusive responsibility for the protection and control of national security information lies with the Executive. *See, e.g., People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003) ("[T]he Executive Branch has control and responsibility over access to classified information and has [a] 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business.") (internal quotations omitted). In this role, the President has instructed Executive agencies to strictly control classified information in their custody and to disclose the classified information they control only when clearly consistent with the interests of national security. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990); *see generally* Exec. Order 13,526, 75 Fed. Reg. 707 (December 29, 2009). The Executive maintains sole responsibility over decisions to grant or deny access to classified material. *See id.* ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."). "[A] district court therefore cannot review the merits" of such a decision. *Id. See also Egan*, 484 U.S. at 526-29.

Courts have no more authority to weigh the issues attendant to a security clearance than anyone else; a "federal court is 'an outside nonexpert body'" which has "no more business reviewing the merits of a decision to grant or revoke a security clearance" than any other "outside nonexpert body." *Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 529). Courts have repeatedly rejected demands that non-governmental counsel or parties in civil cases be permitted access to classified national security material presented to the court *ex parte* and *in camera*. *See, e.g., Pollard*, 705 F.2d 1153 (rejecting Plaintiff's access to *in camera* review of classified documents); *Holy Land Found.*, 333 F.3d at 164; *Stehney v. Perry*, 101 F.3d 925, 931-32 (3d Cir. 1996); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Global Relief Found.*, 315 F.3d at 754. Ultimately, regardless of the outcome of the Court's resolution of Plaintiff's due process arguments, the Court lacks authority to order that counsel be granted security clearances.

The cases cited by Plaintiffs in support of their claim that the Court may review suitability determinations involve judicial review of the *process* (not the outcome) by which a security clearance determination was made. As a result, while in some circumstances courts may order the government to make a suitability determination – *i.e.* undertake a background check and need-to-know analysis – courts lack authority to order the outcome of that determination. This point was exhaustively addressed by the Third Circuit in *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010). After detailed review of the applicable case law, the circuit court emphasized the difference between reviewing process, and reviewing outcome, concluding: "While we cannot review the merits of the decision to revoke El-Ganayni's security clearance, *Stehney* requires us to exercise jurisdiction over El-Ganayni's constitutional claims and review them to the extent that we can do so without examining the merits of that decision." *Id.* (citing *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996)).[9] The basic holdings of *Egan* and

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[9] Two other cases cited are similarly unhelpful. *See In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077 (N.D. Cal. 2009) (requiring government to arrange for and expedite "[plaintiff's counsel] to apply for TS/SCI clearance" but leaving to executive discretion whether clearances should be granted, which they were not); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (requiring only that the government "attempt, to the extent permitted by law, to provide plaintiffs with the opportunity for their lead attorney to *seek to obtain the security clearance* required" to review and respond to the materials

Dorfmont have not changed – that the decision to grant or deny access to classified information rests exclusively within the discretion of the Executive. *Egan*, 484 U.S. at 529; *see also Dorfmont*, 913 F.2d at 1401.[10]

Plaintiffs' attempts to rely on Guantanamo-related case law are also misguided because those cases take place in the narrowly circumscribed field of habeas review pursuant to the Detainee Treatment Act ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680 (2005), a statute which imposes significant burdens on Defendants that are not present here and also mandates certain disclosures; in addition, those cases were viewed as much closer to criminal cases than the purely civil dispute before the Court here.[11] *See Al-Haramain*, 585 F. Supp. 2d at 1259 (distinguishing Guantanamo cases as involving greater liberty interest than IEEPA blocking). The same is true for Plaintiffs' citation to *dicta* in *United States v. A.T.&T Co*, 567 F.2d 121, 133-34 (D.C. Cir. 1977). In that case, which involved the enforcement of a Congressional subpoena, the court held that counsel for Congress might be permitted to participate in *in camera* review of classified information, depending on the sensitivity of the information and their ability to obtain a security clearance, because the counsel was a government official seeking access for a legislative

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filed *ex parte*, but also concluding that *ex parte* review was proper if such clearances could not be arranged).

[10] In the event that this Court decides that the government should undertake a suitability determination, the government will request the opportunity to first undertake the need-to-know determination. A background investigation to access classified material is time-consuming, expensive, and intrusive, and can be avoided if the need-to-know determination is negative.

[11] *See, e.g., Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009); *In re Guantanamo Bay Detainee Litig.,* Misc. No. 08-0442, 2009 WL 50155 (D.D.C. Jan 9, 2009); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). *See also Parhat v. Gates*, 532 F.3d 834, 849-50 (D.C. Cir. 2008) (analogizing to CIPA in determining how to handle classified information in DTA reviews). Nevertheless, even in the Guantanamo cases, the courts acknowledged that there may be times in which the government may rely on classified evidence produced *ex parte* and *in camera*. *See Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) (permitting for the *ex parte* and *in camera* production of highly sensitive information in defending habeas cases under the DTA), *vacated on other grounds,* 554 U.S. 913 (2008).

purpose. In its holding, the Court expressly distinguished cases involving private civil litigants, noting that "private parties do not have a right to have their counsel participate in *in camera* proceedings." *Id.*

As an alternative to the security clearances that are clearly unavailable by law, Plaintiffs propose that the Court invent and impose procedures akin to those used in criminal proceedings involving classified information. In a criminal proceeding, the criminal defendant's physical liberty is at stake, the Confrontation Clause provides an additional basis for a defendant's access, and Congress has enacted a statute, the Classified Information Procedures Act ("CIPA"), to ensure access to some (but not necessarily all) classified information used in a criminal proceeding or substitutes for that information. *See* 18 U.S.C. app. 3, § 4. No such interests are at play in the instant civil summary judgment proceeding. Moreover, Plaintiffs' demand for a "substitute disclosure" is uniquely misplaced here, where Defendants have already articulated the harms publicly to the extent permissible under law. *See* Defs' SJ at 40-43. In any event, courts do not impose CIPA-style procedures in civil proceedings involving *ex parte* submissions. *See supra* at 15-17.

Nor is an attorney protective order a solution. Even within the government, classified information is tightly controlled and limited to persons with an operational need to know. As the D.C. Circuit recognized in *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983), "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." Further, "information may be compromised inadvertently as well as deliberately." *See Colby v. Halperin*, 656 F.2d 70, 72 (4th

Cir. 1981); *see also Sterling*, 416 F.3d at 348 (explaining that courts should not "play with fire" when risking disclosure of classified information).

Finally, although Plaintiffs argue that the Court could order the government to grant security clearances, Plaintiffs seem to recognize that the Court cannot order disclosure over the government's objection. *See* Pls' Br. at 1 (arguing that Defendants "must choose" between disclosing information or "foregoing reliance" on it). Accordingly, if the Court accepts Plaintiffs' argument that the *ex parte* submissions are *per se* improper, even in this national security context, the only available remedy would be for the Court not to rely on those submissions. Defendants cannot, consistent with the law, make any classified information available to Plaintiffs' counsel.

III. THE COURT MAY REVIEW LAW ENFORCEMENT PRIVILEGED INFORMATION *EX PARTE*

Defendants have also submitted a limited amount of law enforcement privileged information in support of their motion for summary judgment. Specifically, privileged information has been redacted from the First Piehota Declaration, and Defendants also filed *ex parte* a portion of a memorandum explaining the material in the Piehota Declaration. The law enforcement privileged information submitted to the Court provides general background information on the administration of the No Fly List, including information about how individuals are added to the list and the procedures followed when U.S. persons are denied boarding on flights to the United States. *See* Notice (Docket No. 49); First Piehota Dec. (Docket No. 44-1).[12] Such information is implicated by Plaintiffs' claims, because they contend that existing procedures are insufficient. *See* Am. Compl., Prayer for Relief. Accordingly, the

[12] Some information is marked as both law enforcement and SSI. These privileges each provide an independent basis for non-disclosure.

submitted information is properly part of the Court's review of Plaintiffs' claims, and the Court's ability to review this information is consistent with the general principle of decisions such as *Jifry*, where the D.C. Circuit held that courts had "inherent authority" to review *ex parte* information about a challenged agency action. 370 F.3d at 1182; *see also al-Haramain*, 585 F. Supp. 2d at 1258-59.

The federal investigatory or law enforcement privilege is "rooted in common sense as well as common law," *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 542 (D.C. Cir. 1977), and its purpose is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investigation of City of N.Y.*, 856 F.2d 481, 484 (2d Cir.1988). The law enforcement privilege is a qualified privilege that requires "a need to balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *In re Sealed Case*, 856 F.2d 268, 271 (D.C.Cir.1978); *see also Cabral v. DOJ*, 587 F.3d 13 (1st Cir. 2009) (upholding assertion of privilege over law enforcement techniques).[13]

[13] In deciding whether the privilege should apply, courts sometimes balance the following factors:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case.

The Ninth Circuit has explicitly recognized the propriety of *ex parte* review of privileged material. In *Meridian Int'l*, the district court reviewed *ex parte* an FBI declaration containing information about ongoing investigations. 939 F.2d at 745. The district court relied on this *ex parte* submission in reaching its conclusion that an FBI agent was acting within the scope of his employment and therefore was not subject to suit. *Id*. The Ninth Circuit approved this process given the sensitivity of ongoing investigations. *Id.* The Court limited its holding to the unique circumstances before it, but noted more broadly that "[w]hile in our judicial system adversary proceedings are the norm and ex parte proceedings the exception, this court has generally recognized the capacity of a district judge to 'fashion and guide the procedures to be followed in cases before him.'" *Id*. at 745 (quoting *United States v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987)). The United States District Court for the District of Columbia explicitly upheld the *ex parte* submission of privileged information in *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64, 72 (D.D.C. 2008), holding: "Plaintiff's argument makes little sense. It does not follow logically that because IEEPA provides for *in camera* review of classified portions of the Administrative Record that it therefore also provides the Plaintiff the right to non-classified, but privileged, portions." *Id. See also Thompson*, 827 F.2d at 1258-59 (collecting criminal proceedings in which *ex parte* proceedings were approved because a "compelling justification" supported nondisclosure). Similar *ex parte* submissions seem particularly appropriate here, where the submissions are made for the purpose of a judicial decision on whether or not additional disclosure is required.

Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973), overruled on other grounds, *Startzell v. City of Phila*., No. 05-05287, 2006 WL 2945226 (E.D. Pa. Oct.13, 2006); *see also in re Sealed Case*, 856 F.2d at 272. These factors facially apply mostly in cases involving confidential informants in ongoing investigations and are accordingly of little use here, where the privilege is asserted over law enforcement methods and procedures.

The cases cited by Plaintiffs do not dictate a contrary result. In *Thompson*, for example, the Ninth Circuit surveyed cases in which *ex parte* proceedings were supported by a "compelling justification," such as *ex parte* consideration of whether to reveal to the defense the identity of a criminal informant. *See Thompson*, 827 F.2d at 1258-59 (collecting cases where *ex parte* submissions were appropriate). Conducting a heavily fact-specific inquiry, the Court concluded that the government had not justified an *ex parte* submission of information in response to a *Batson* challenge by relying on potential prejudice to the prosecution strategy and purported administrative burden. The case is distinguishable. *Thompson* was a criminal trial in a purely domestic law enforcement context, and the Court found that these weak rationales were "not an appropriate or sufficient justification for resorting to ex parte proceedings in *this* case." *Id.* at 1259 (emphasis in original). The Court, however, explicitly recognized that *ex parte* proceedings could be used under appropriate circumstances.[14]

Similarly, *Kinoy v. Mitchell*, 67 F.R.D. 1, 10 (S.D.N.Y. 1975), notes that "there are . . . well recognized grounds upon which the Government may claim privilege in civil litigation." *Id.* And that such "information is protected by a qualified, not an absolute privilege, so that the claim of privilege made by the Government may be overcome by a litigant's showing of need for

[14] Other cited cases are similarly unavailing because the *ex parte* procedures violated a rule, lacked any reasonable justification for protecting the information, and/or were outside the context of reasonable national security rationales. For example, in *Guenther v. Comm'r of Internal Revenue*, 939 F.2d 758 (9th Cir. 1991), in apparent violation of Tax Court procedures, the IRS did not disclose its trial memorandum to the taxpayers until after the trial, despite the public nature of the information and argument involved. *See also Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1348 (9th Cir. 1991) (court's reliance on confidential tenure file was inappropriate in discrimination action against university); *Vining v. Runyon*, 99 F.3d 1056, 1057-58 (11th Cir. 1996) (similar and noting that "consideration of *in camera* submissions to determine the merits of litigation is allowable . . . when the submissions involve compelling national security concerns"); *Kinoy v. Mitchell*, 67 F.R.D. 1, 15-16 (S.D.N.Y. 1975) (rejecting use of *ex parte* material to justify legality of alleged domestic surveillance but noting the importance of balancing the competing interests).

the material great enough to outweigh the policies favoring nondisclosure." *Id.* at 11.[15] Plaintiffs have not challenged the appropriateness of the privilege designations at issue here, and have offered no support for a claim that their need for the information at issue is great enough to overcome the privilege assertion.[16]

Here, substantial concerns support nondisclosure of the law enforcement information. It is unclear if Plaintiffs actually challenge the assertion of privilege; they have presented no argument that the assertion is in error. Regardless, the attached Second Declaration of Christopher Piehota is submitted to support the assertion of privilege over this information and to describe the harms that could result from disclosure. *See generally* Second Declaration of Christopher Piehota, dated January 7, 2011 (attached hereto as Exhibit A) ("Second Piehota Dec.").

Specifically, three types of information were withheld from the First Piehota Declaration, including information related to refinements to the No Fly and Selectee Criteria (including those that were made after the attempted bombing of Northwest Flight 253 on December 25, 2009); information related to the size of the Terrorist Screening Database, the No Fly List, and the number of U.S. persons on the No Fly List; and information related to the process TSC follows when it is advised that a U.S. person (a citizen or lawful permanent resident) has been denied boarding on a flight from overseas bound for a destination in the United States or traversing through U.S. airspace. *See* Second Piehota Dec., ¶ 6. All of this information is protected from disclosure pursuant to the law enforcement privilege, because its disclosure would compromise important counterterrorism measures and encourage circumvention of aviation security measures. *See id.*, ¶¶ 6-9. In particular, knowledge of the refinements made to the No Fly and Selectee criteria, as well as the size of the No Fly and Selectee Lists, could reveal the focus of the government's counter-terrorism efforts. *See id.* ¶¶ 8-9. The same is true for knowledge of the policies and operational procedures used for U.S. persons prohibited from boarding flights when located abroad; this process is "designed to balance travel difficulties encountered by U.S. persons abroad and aviation security" and as part of it, TSC considers information related to "national security and ongoing law enforcement investigations, as well as factors related to aviation security." *See id.*, ¶¶ 10.[17]

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[15] *Kinoy* is further distinguishable because the evidence the government sought to admit *in camera* in that case was "of central importance to the Plaintiff's case." *Id.* at 15 n.50. By contrast, the privileged material at issue here is additional support for the reasonableness of administrative process that is discussed openly to the extent possible. Plaintiffs' Complaint seems to maintain that any *ex parte* administrative process is unreasonable; accordingly, further access to the *ex parte* process seems to have no effect on Plaintiff's case, except insofar as it might moot some claims.

[16] Other cases cited by Plaintiffs are distinguishable. In *Bane v. Spencer*, 393 F.2d 108, 109-10 (1st Cir. 1968), the First Circuit held that a state government official could not affirmatively use medical records in summary judgment. It is not at all clear from the opinion why Plaintiffs' medical records could be kept from the Plaintiff in any event, and the Court did not note any justification whatsoever for nondisclosure, much less a justification analogous to the weighty concerns of counterterrorism measures at issue here. Plaintiffs also cite an old First Circuit case for the proposition that a Court can never rely on *ex parte* privileged information in deciding motions for summary judgment. *See generally Ass'n for Reduction of Violence v. Hall,* 734 F.2d 63 (1st Cir. 1984). The Court in that case does not seem to have reached nearly so broad a conclusion. If it did, the holding is impossible to square with Ninth Circuit precedent like *Meridian Int'l.*

The Court has discretion to determine whether the redacted information in the Piehota Declaration is relevant to the Court's resolution of the issues raised in Defendants' dispositive motion. Given the substantial concerns about disclosure, *ex parte* review of law enforcement information is justified at this stage of the proceeding. If the Court determines that the information is either not relevant or not appropriate to consider, then the correct remedy is to disregard, not to reveal the information to Plaintiffs as they have requested.

[17] The discovery orders in *Ibrahim v. DHS*, 2009 WL 5069133 (N.D. Cal. 2009) do not dictate a contrary result. Those orders were vacated by the Ninth Circuit. *See* Case No. 10-15342 (December 17, 2010). Moreover, in *Ibrahim*, the district court reviewed *ex parte* the declarations and arguments, upheld some assertions of the law enforcement privilege and ordered certain disclosures. Here, by contrast, Plaintiffs have made no argument as to why the assertion of the privilege is in error. Defendants maintain that the discovery orders in *Ibrahim* were in error. The government did not have an opportunity to appeal those decisions because the case was settled by the private parties shortly after the orders were issued.

IV. THE COURT MAY REVIEW SENSITIVE SECURITY INFORMATION *EX PARTE*; PLAINTIFFS MAY SEEK ACCESS TO IT THROUGH PROPER PROCEDURES

Lastly, the Defendants have also submitted a limited amount of sensitive security information ("SSI") in support of their motion for summary judgment. Specifically, the SSI provided to the Court consists of certain information redacted from the First Piehota Declaration and portions of the memorandum submitted *ex parte*; it includes the criteria for being placed on the No Fly List, the criteria for being placed on the Selectee List, the guidance provided to federal agencies regarding implementation of the No Fly List, and information about the procedures followed when U.S. persons are denied boarding on flights to the United States. *See* First Piehota Dec. ¶¶ 14-29; 37-42. These submissions provide general background information and details about the procedures challenged by Plaintiffs and thus may be relevant to the Court's assessment of the government's interest in the No Fly List. The First Piehota Declaration was reviewed by TSA prior to filing, in order to identify exactly what information therein constitutes SSI.

SSI is defined as information obtained or developed in the conduct of security activities, the disclosure of which TSA has determined would, among other things, be detrimental to the security of transportation. *See* 49 U.S.C. § 114(r); 49 C.F.R. pt. 1520. Congress expressly delegated to TSA the authority to determine what information constitutes SSI. Plaintiffs do not dispute that TSA must prevent disclosure of SSI to non-covered persons who do not have a need to know pursuant to 49 C.F.R. §§ 1520.7 and 1520.11.[18] Plaintiffs also do not dispute the validity of TSA's privilege to block disclosure of SSI. Under this privilege, "information may be withheld, *even if it is relevant to the lawsuit and essential to the establishment of plaintiff's*

[18] Individuals considered to be "covered persons" may not disclose SSI in their possession or control to "non-covered persons" without written authorization from TSA. *See id.* § 1520.9(a)(1)-(3).

claim." *See Chowdhury v. Nw. Airlines Corp.*, 226 F.R.D. 608, 611 (N.D. Cal. 2004) (refusing to compel disclosure of SSI under a protective order) (quoting *Baldridge v. Shapiro*, 455 U.S. 345, 360 (1982)) (emphasis in *Chowdhury*).

There are only two avenues by which a civil plaintiff may seek access to SSI. The first is to challenge the designation of that information as SSI pursuant to a statute covered by 49 U.S.C. § 46110. Such a challenge, however, must be brought in the Court of Appeals. *See* 49 U.S.C. § 46110(a); *MacLean v. DHS*, 543 F.3d 1145 (9th Cir. 2008) (holding explicitly that SSI determinations are final orders of TSA subject to review only in the Court of Appeals); *Chowdhury*, 226 F.R.D. at 614. In assessing a petition to review an SSI designation, the Court of Appeals accords significant deference to the agency's interpretation of its regulations and assessment of the security risk. *See MacLean*, 543 F.3d at 1150. Plaintiffs have not utilized this avenue and do not purport to challenge TSA's designation of the information as SSI.

Second, in 2006, Congress passed a provision contained within the Department of Homeland Security Appropriations Act that permits access to SSI in civil litigation in federal district court under certain circumstances.[19] *See* Section 525(d) of the Department of Homeland Security Appropriations Act, 2007, Public Law No. 109-295, § 525(d), 120 Stat. 1382 (Oct. 4, 2006), as reenacted by Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 522, 121 Stat. 2069 (Dec. 26, 2007); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 510, 122 Stat. 3682 (Sept. 30, 2008); and the Legislative Branch Appropriations and Continuing Appropriations Resolution of 2010, Pub. L. 111-68, Division B, § 101, 123 Stat. 2023 (Oct. 1, 2009) ("Section 525(d)"). Specifically, Section 525(d) provides in relevant part:

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[19] Nothing in these acts allows a district court to review the initial designation of information as SSI; nor do Plaintiffs purport to challenge the designation of information as SSI.

> [t]hat in civil proceedings in the United States District Courts, where a party seeking access to SSI demonstrates that the party has substantial need of relevant SSI in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the information by other means, the party or party's counsel shall be designated as a covered person under 49 CFR Part 1520.7 in order to have access to the SSI at issue in the case, provided that the overseeing judge enters an order that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access, unless upon completion of a criminal history check and terrorist assessment like that done for aviation workers on the persons seeking access to SSI, or based on the sensitivity of the information, the Transportation Security Administration or DHS demonstrates that such access to the information for the proceeding presents a risk of harm to the nation.

Section 525(d).

TSA has established procedures for the implementation of Section 525(d). As stated in the government's January 4, 2011, letter to Plaintiffs' counsel, access to SSI may be granted in this matter if one of Plaintiffs' attorneys applies to TSA in writing and demonstrates that Plaintiffs' counsel "has substantial need of relevant SSI in the preparation of [Plaintiffs'] case and that [Plaintiffs are] unable without undue hardship to obtain the substantial equivalent of the information by other means." Letter from Diane Kelleher to Ben Wizner, dated January 4, 2011 (attached as Exhibit B) (citing Section 525(d)). Further, TSA must have the opportunity to conduct "a criminal history check and a terrorist assessment," and evaluate whether providing such access would "present[] a risk of harm to the nation." *Id.* Finally, before access can be granted, a protective order must be entered that "protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access." *Id.* When access to SSI is granted under Section 525(d), cleared counsel becomes a "covered person" under the regulations and is subject to TSA enforcement action in the event he or she does not handle the SSI in accordance with applicable law. *Id.*

As stated in the January 4, 2011 letter, Defendants informed Plaintiffs of TSA's ordinary procedures and advised Plaintiffs that they could submit a request to TSA through undersigned counsel. *See* Exhibit B. Defendants have no authority to authorize disclosure of SSI to Plaintiffs themselves. Plaintiffs' counsel has not yet sought access to SSI from TSA; nor have they submitted the name of any counsel for a background check as required under Section 525(d).

Until one of Plaintiffs' counsel applies to TSA, it will not be clear whether the information in this case and the counsel seeking access to it meet the standard for disclosure under Section 525(d). With respect to the first two prongs – substantial need and lack of alternatives – Plaintiffs argue that the *ex parte* SSI is "plainly relevant" because it was submitted with Defendants' Motion for Summary Judgment. Under Section 525(d), however, the standard is not mere "relevance" but "substantial need of relevant information for preparation of the party's case." Plaintiffs' counsel may well be able to articulate a substantial need to TSA, but they have not yet done so at this time. Plaintiffs' Amended Complaint seems to contend that the *ex parte* nature of the DHS TRIP administrative proceeding renders it unconstitutional regardless of the content of that *ex parte* process. Arguably, therefore, additional knowledge about that process should be unnecessary to the preparation of Plaintiffs' case. And it seems unlikely that the Plaintiffs could demonstrate "substantial need" for background information such as the criteria for the Selectee List, given that all Plaintiffs contend they are on the No-Fly List. *See* First Piehota Dec. ¶ 16; Am. Compl ¶ 3.

More importantly, TSA or DHS must have the opportunity to evaluate whether granting access would present "a risk of harm to the nation," either because of the results of the "criminal history check and terrorist assessment" or because of the sensitivity of the information. Plaintiffs seem to believe that the Court can compel disclosure of SSI without any initial review by TSA.

However, Section 525(d) must be read in conjunction with the TSA Administrator's broad statutory and regulatory authority over SSI. To read that section as precluding TSA or DHS from making the initial determination as to whether access to SSI should be granted to any civil litigant would be inconsistent with these broad authorities. Thus, until one of Plaintiffs' counsel applies to TSA for access to the SSI at issue and submits to vetting, Plaintiffs' demand of the Court is at best premature.

Finally, if TSA ultimately determines that disclosure of SSI poses an unacceptable risk of harm, the Court may nonetheless review the information *ex parte* pursuant to the same rationale that permits the Court to consider law enforcement information. The *ex parte* submission presents information about procedures that Plaintiffs have challenged, and fairness is better served by the Court's *ex parte* review of that material than it is by exclusion. That is particularly true in the context of the present motion for summary judgment where Plaintiffs have asked the Court to find the current DHS TRIP administrative procedures inadequate and order additional disclosures. Such *ex parte* review is plainly within the discretion of the district court. *See Meridian Int'l*, 939 F.2d at 745.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Strike.

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Respectfully submitted,

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